Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling	)	WC Docket No. 18-221
Regarding Two-Stage Traffic	)	

COMMENTS OF PEERLESS NETWORK, INC.

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I. INTRODUCTION AND SUMMARY

Peerless Network, Inc. ("Peerless"), by its attorneys, submits these comments in response to the Petition for Declaratory Ruling ("Petition") filed by MCI Communications Services, Inc. d/b/a Verizon Business Services, Verizon Services Corp., and Verizon Select Services, Inc. (collectively, "Verizon") on June 15, 2018 in the above-captioned proceeding.[1]

In its Petition, Verizon requests that the Commission find that a local exchange carrier ("LEC") may not assess tariffed end office terminating switched access charges on calls delivered to Internet Protocol ("IP")-enabled platforms, including calls to purported two-stage calling platforms use for voicemail, conference bridging, and calling card services.[2] The Commission should deny the Petition. As explained below, Peerless and its partner providers of Interconnected Voice over Internet Protocol ("VoIP") service do not simply "hand off" traffic to IP-enabled platforms.[3] Under longstanding Commission precedent, these platforms represent end users for the purpose of determining switched access charges and Peerless and its Interconnected VoIP partners provide the functional equivalent of terminating tandem or end

[1] Verizon Petition for Declaratory Ruling Regarding Two-Stage Traffic, WC Docket No. 18-221 (June 15, 2018) ("Petition"). *See Pleading Cycle Established for Verizon Petition for Declaratory Ruling*, WC Docket No. 18-221, DA 18-748 (July 20, 2018).

[2] Petition at 1.

[3] *Id.*

office switched access services when they deliver traffic to the platforms.[4] LECs such as Peerless therefore are entitled to collect their tariffed terminating switched access charges for providing such services. The Commission should reject Verizon's attempt to ignore the actual applicable law associated with IP-enabled services, and instead impose an antiquated "end-to-end" analysis related to the jurisdiction of legacy telecommunications services, to determine the appropriate switched access charges for traffic delivered to Interconnected VoIP providers. Contrary to Verizon's claims, the Commission has never prohibited LECs from collecting switched access charges for terminating calls to IP-enabled platforms and should not do so now in response to the Petition. Instead, the Commission should confirm that traffic delivered to an IP-enabled platform terminates at the platform and LECs may collect their applicable tariffed switched access charges for terminating such traffic.

II. DISCUSSION

Peerless and its subsidiaries operate as a competitive LEC and interexchange carrier ("IXC") providing a variety of retail and wholesale services, including tandem-based transit, long distance, toll-free calling, and facilities-based local exchange services in addition to switched access services. Peerless provides this diverse suite of services to its customers, which include major IXCs like Verizon as well as well-known providers of Interconnected VoIP

[4] While the FCC has not previously defined "IP-enabled platforms," the FCC has stated that "[c]ustomers are beginning to substitute IP-enabled services for traditional telecommunications services and networks, and we seek comment on the rate and extent of that substitution. Increasingly, these customers will speak with each other using VoIP-based services instead of circuit-switched telephony and view content over streaming Internet media instead of broadcast or cable platforms. By doing so, they will change, fundamentally, their use of these applications and services - consumers will become increasingly empowered to customize the services they use, and will choose these services from an unprecedented range of service providers and platforms." *In re IP Enabled Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 1 (2004) ("*IP Enabled Services NPRM*").

service. Peerless provides telephone numbers and local exchange services to its VoIP partners. Peerless does not maintain or control any IP-enabled two-stage dialing platforms, although there are VoIP partners that may maintain such platforms. Peerless terminates calls that are dialed to telephone numbers assigned to its VoIP partners and delivers traffic to IP-enabled platforms on behalf of its customers.[5] However, Verizon and other IXCs have withheld payment on tariffed end office terminating switched access charges for such services, resulting in repeated litigation. The Commission therefore should take action to resolve disputes regarding end office terminating switched access charges and confirm that LECs may collect such charges for terminating traffic to IP-enabled platforms.

A. The Commission Should Take Action to Resolve Ongoing Disputes Regarding Switched Access Charges for Traffic Delivered to IP-Enabled Platforms

Disputes over tariffed end office terminating switched access charges for traffic delivered to IP-enabled platforms continue to plague the telecommunications industry.[6] Although the recent transition of price cap carriers to bill-and-keep for end office terminating access service may help avoid conflicts in the future, disputes remain over charges billed prior to the transition.[7] In addition, clarification from the Commission on this issue is needed to address disputes

[5] Verizon, without citing any legal support, asserts that the calls at issue in its Petition only involve calls where the consumer places a standard long distance call, and that the originating LEC serving the two-stage platform through local telephone numbers would pay originating access charges. Petition at 3, n.5. Peerless disputes this characterization. LECs would never have an obligation to pay originating switched access charges on a locally dialed call to a calling card platform.

[6] *Id.* at 2-3.

[7] *See* 47 C.F.R. § 51.907(h).

involving rate-of-return LECs and rural competitive LECs, which have not yet fully transitioned to bill-and-keep.[8]

The treatment of traffic destined to IP-enabled platforms is one of the key issues in the ongoing litigation between Peerless and Verizon. For years, Peerless provided switched access services to Verizon without dispute, including the delivery of traffic to IP-enabled platforms, pursuant to both privately negotiated commercial agreements as well as Peerless's state and federal tariffs. But Verizon began withholding payment on Peerless's switched access charges based on its unilateral determination that Peerless's tariffs were unlawful. Verizon eventually stopped making *any* end office (or tandem) switched access payments to Peerless without properly disputing the charges under Peerless's tariffs or even explaining how Verizon determined the amount payments to withhold.

Verizon's failure to pay severely impacted Peerless's business, requiring it to initiate litigation in the Northern District of Illinois.[9] In response to cross-motions for summary judgment, the court granted partial summary judgment on Peerless's collection claims, finding that Verizon unlawfully withheld payment on valid switched access charges without properly challenging Peerless's tariffs.[10] The court also partially denied without prejudice Verizon's motion for summary judgment and referred certain issues to the Commission under the primary

[8] *See* 47 C.F.R. § 51.909(j).

[9] *Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, Case No. 14-cv-7417 (N.D. Ill.) (filed Sep. 23, 2014).

[10] *Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, 2018 U.S. Dist. LEXIS 43044, *54-56 (N.D. Ill. March 16, 2018) ("*Peerless/Verizon Order*"). The court recently entered final judgment on Peerless's collection claims, awarding it over $48 million in damages. *See Peerless Network, Inc. v. MCI Commc'ns Servs., Inc.*, 2018 U.S. Dist. LEXIS 125573, *18 (N.D. Ill. July 27, 2018).

jurisdiction doctrine, including issues regarding the treatment of traffic delivered to IP-enabled platforms for access charge purposes.[11]

Notwithstanding the foregoing litigation, not all interexchange carriers share the same view or approach in contesting calls to IP-enabled platforms. Commission action regarding switched access charges for traffic delivered to IP-enabled platforms is critical not only to resolve the ongoing dispute between Peerless and Verizon, but also to avoid inconsistent decisions by IXCs in paying switched access charges and courts that engender costly litigation in the telecommunications industry.

Verizon' Petition is just another attempt by long distance carriers to avoid paying access charges for services provided by LECs that allow IXCs to complete calls for the benefit of the IXC. For interLATA calls that are terminated to an IP-enabled platform, the call originates when an IXC subscriber initiates a call through the originating LEC, which is paid originating switched access charges from the IXC, and is terminating to the telephone number of the IP-enabled platform in another LATA. Every LEC provider in the call flow (originating end office, originating tandem, terminating tandem, and terminating end office) assesses access charges to the IXC. Should none of these carriers be allowed to charge the IXC for the services? Verizon cites the Commission's rules that require IXCs to pay LECs for services provided,[12] but then argues that no IXC should pay any fees that permit the IXC to complete its calls.

A Commission decision denying Verizon's Petition will ensure that all carriers receive the same intercarrier compensation for providing the same service and eliminate the potential for IXCs to refuse payment on tariffed end office terminating switched access charges to obtain an

[11] *Peerless/Verizon Order* at *40.

[12] Petition at 1, n.2 (citing 47 C.F.R. § 51.913).

unfair advantage over competitors. The Commission therefore should facilitate resolution of disputes regarding traffic delivered to an IP-enabled platform and confirm that such traffic terminates at the platform, entitling LECs to collect end office terminating switched access charges through tariff.

B. Calls Terminate to IP-Enabled Platform End Users Under Longstanding Commission Precedent

In its Petition, Verizon argues that two-stage dialing traffic does not terminate at the IP-enabled platform.[13] Specifically, Verizon contends that the Commission treats two-stage dialing traffic as a single "end-to-end" call that terminates not at the platform, but rather at the location of the second call placed from the platform.[14] But the end-to-end analysis relied upon by Verizon in its Petition was adopted before the advent of IP-enabled services and the Commission's determination that Internet Service Providers ("ISPs") are end users for the purpose of determining switched access charges under its longstanding enhanced service provider ("ESP") exception.[15] The Commission has therefore already confirmed that an end-to-end analysis does not apply to traffic delivered to IP-enabled platform end users, and the Commission should not modify this precedent.

[13] *Id.* at 3-10.

[14] *Id.* at 4 (citing *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, ¶ 12 (1995)).

[15] *IP Enabled Services NPRM* at ¶ 4 ("[W]hereas enhanced functionalities delivered via the PSTN typically must be created internally by the network operator and are often tied to a physical termination point, IP-enabled services can be created by users or third parties, providing innumerable opportunities for innovative offerings competing with one another over multiple platforms and accessible wherever the user might have access to the IP network.").

The origins of the ESP exception stem from the Commission's *Computer I* and *Computer II* decisions.[16] In *Computer I*, the Commission drew a clear distinction between legacy circuit and message-switching services and services involving "data processing" of communications.[17] The Commission elected not to impose legacy telecommunications regulations on data processing services in order to facilitate "new and improved services and lower prices."[18] While the Commission recognized the potential for "hybrid" offerings that integrated legacy telecommunications services with data processing services, it determined that applying traditional regulatory approaches to hybrid offerings "would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest."[19] The Commission therefore determined at the outset of its consideration of data processing services that such services would not be treated the same as legacy telecommunications services in order to encourage next-generation technologies and consumer offerings.

Computer II largely affirmed the Commission's distinction between legacy telecommunications services and data processing services through the concepts of "basic services" and "enhanced services."[20] The Commission found that basic services offer "a pure

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[16] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Commc'ns Servs. and Facilities*, Final Decision and Order, 28 FCC 2d 267 (1971) ("*Computer I*"), *aff'd in part sub nom., GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II*"), *aff'd sub. nom., Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[17] *Computer I* at ¶¶ 4-18, Appendix A.

[18] *Id.* at ¶¶ 4, 11.

[19] *Id.* at ¶ 31.

[20] *Computer II* at ¶ 5.

transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."[21] By contrast, enhanced services "combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information."[22] An enhanced service does not need to change the content of the information transmitted and "may simply involve subscriber interaction with stored information."[23] An enhanced service covers any offering that provides "more than a basic transmission service," thereby including hybrid services.[24]

Relying on the basic/enhanced service framework developed in *Computer I* and *Computer II*, the Commission established the ESP exemption in 1983, determining that ESPs are not required to pay certain interstate access charges.[25] The Commission explained that the exemption was necessary as ESPs encountered "a unique period of rapid and substantial change."[26] In particular, the Commission stated that the absence of an access charge exemption for ESPs "could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired."[27] The Commission found the exemption would provide regulatory certainty for both ESPs and those providing service to ESPs.[28] Critically, the Commission explicitly stated that the ESP exemption demanded that "enhanced service

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[21] *Id.* at ¶ 96.

[22] *Id.* at ¶ 5.

[23] *Id.* at ¶ 97.

[24] *Id*.

[25] *See MTS & WATS Mkt. Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, ¶ 83 (1983).

[26] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Serv. Providers*, Order, 3 FCC Rcd 2631, ¶ 1 (1988).

[27] *Id.* at ¶ 17.

[28] *Id.* at ¶ 1.

providers are *treated as end users for purposes of applying access charges.*"[29] Thus, calls delivered to an ESP are calls delivered to an end user for access charge purposes.

ISPs represent a class of ESPs and therefore are treated by the Commission as end users for access charge purposes.[30] Under the ESP exemption, the Commission has long permitted ISPs to purchase interstate access services through tariffs and noted that the "LEC-provided link between an end-user and an ISP is properly characterized as *interstate* access."[31] Consequently, when a LEC delivers traffic from an IXC to an end-user ISP, it is providing interstate access services subject to switched access charges.[32] The Commission underscored the end-user status of ISPs in its 2011 *Transformation Order*, stating that, "under the ESP exemption, rather than paying intercarrier access charges, information service providers were permitted to purchase access to the exchange as end users."[33] The Commission further explained that it "has always recognized that information-service providers . . . were obtaining exchange access from the LECs."[34] The Commission therefore treats IP-enabled platforms as end users that purchase exchange access services from LECs in order to receive terminating traffic from IXCs and other service providers. As a result, LECs should receive terminating switched access charges for terminating IXC traffic to IP-enabled platforms pursuant to tariff.

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[29] *Id.* at ¶ 2, n. 8 (emphasis added).

[30] *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 57 (2001).

[31] *Id.* at ¶¶ 55-57 (emphasis in original).

[32] *See, e.g., GTE Tel. Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 21 (1998) ("The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.") ("*GTE*").

[33] *Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 957 (internal citations omitted) ("*Transformation Order*").

[34] *Id.*

Verizon does not mention the ESP exemption in its Petition, let alone address the Commission's application of the exemption to IP-enabled services. Verizon does not suggest that IP-enabled two-stage dialing platforms provide only "pure transmission capability" or basic telecommunications service. Indeed, the platforms operated by Peerless's VoIP partners axiomatically entail enhanced services that act on the "format" and "protocol" of the transmitted information. But even if the platforms did not alter the content of the information transmitted, they certainly involve the interaction with stored information, such as voicemails or calling card balance data. As the IP-enabled platforms provide something more than a basic transmission service, they are ESP end users receiving terminated traffic from LECs such as Peerless.

Verizon's insistence on an end-to-end analysis ignores important distinctions between ESPs and legacy telecommunications service providers emphasized by the Commission and courts when tackling intercarrier compensation issues. As the Commission previously detailed, "[w]hereas circuit-switched networks generally reserve dedicated resources along a path through the network, IP networks route traffic *without requiring the establishment of an end-to-end path*."[35] IP-network traffic can be routed in the same local exchange or in another country, sometimes simultaneously.[36] The mere fact that an IP-enabled platform may "originate[] further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP."[37] The origination of a second call does not represent a continuation of the first call; that call terminated at the end user IP-enabled platform under the ESP exemption. Verizon's Petition fails to rebut the long-held presumption expressed in *Bell Atlantic* that the "[t]he end-to-

[35] *IP Enabled Services NPRM* at ¶ 8 (emphasis added).

[36] *GTE* at ¶ 22.

[37] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000) ("*Bell Atlantic*").

end analysis applied by the Commission . . . is one that it has traditionally used to determine whether a call is within its interstate *jurisdiction*," not whether a call is terminated for the purposes of assessing end office switched access charges.[38] "However sound the end-to-end analysis may be for jurisdictional purposes," nothing contained in the Commission's rules and precedent shows "why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation."[39] In fact, applying the end-to-end analysis to IP-enabled platforms, as Verizon requests, would directly conflict with the Commission's determination that such platforms represent end users for determining switched access charges.

Verizon also fails to address the administrative challenges inherent in its end-to-end analysis when dealing with traffic sent to two-stage dialing platforms. The Petition assumes that all calls made to a platform necessarily involve a second call to an international destination.[40] But there is no systemic way to determine with certainty that a call to a particular platform results in a second call. First, determining whether a number is associated with a platform is not an automatic process and involves a manual review of call information. Second, it is difficult to determine whether a second call is originated from a platform because the platform may provide multiple functions in addition to re-origination. Verizon ignores the fact that many circumstances exist where a second call may not be made from the platform. As one example, when a call is delivered to a conference calling platform and the caller enters additional details on the platform, the call is not delivered to a separate destination. As another example,

[38] *Id.* at 3 (emphasis in original).

[39] *Id.* at 7.

[40] *See, e.g.*, Petition at 3 (stating that "because the consumer is already placing a domestic long-distance call to reach the platform" the consumer wants to each a person "located in another country").

subscribers may call a platform to interact with it directly, such as to make a balance inquiry. The same is true when a party calls a platform and then enters additional numbers to access voicemails. While each of these situations involves a call to a platform, none of them involves a second phase. Verizon's Petition does not address these scenarios or explain how it can determine with any certainty when traffic destined to a platform involved a second call. Thus, the Commission should deny Verizon's Petition and confirm that an end-to-end analysis does not apply to traffic destined to an IP-enabled platform.

In denying Verizon's Petition, the Commission also should confirm that LECs and their VoIP partners perform the functional equivalent of end office switched access services when terminating traffic to IP-enabled platforms. Verizon claims that VoIP-LECs do not provide end office switched access services, but rather "only perform[] intermediate routing of the call on its way to the actual called party."[41] However, as Peerless explained in its recent comments on the CenturyLink Petition for Declaratory Ruling, Peerless and its VoIP partners perform the functional equivalent of end office switched access services under the Commission's VoIP symmetry rule.[42] The VoIP symmetry rule allows LECs to bill and collect for the "functional

[41] *Id.* at 5. It appears that Verizon and other IXCs concede that LECs and their VoIP partners at least provide the functional equivalent of *tandem* terminating switched access services. *See id.*; Comments of AT&T on CenturyLink Petition for Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92, at 4 (June 18, 2018) (asking the Commission to find that "over-the-top LEC-VoIP partnerships may charge only for tandem switching services") ("AT&T Comments"); *AT&T Corp. v. Beehive Tel. Co., Inc.*, 2010 U.S. Dist. LEXIS 5804, *6 (D. Ut. Jan. 26, 2010) (noting that tandem charges generally are incurred for connecting and routing traffic between end office switches). Thus, to the extent the Commission determines in response to the Petition that VoIP-LECs do not provide the functional equivalent of end office switched access services when terminating traffic to IP-enabled platforms, it should clarify that VoIP-LECs are still entitled to collect tandem terminating switched access charges from IXCs and others for providing such services.

[42] *See* Comments of 01 Communications, Inc. and Peerless Network, Inc., WC Docket No. 10-90, CC Docket No. 01-92, at 6-12 (June 18, 2018) ("01/Peerless Comments"); Reply Comments of 01 Communications, Inc. and Peerless Network, Inc., WC Docket No. 10-90, CC Docket No.

equivalent" of incumbent LEC services performed not only by the LEC itself, but also for functions performed by their VoIP partners.[43] The Commission intended the VoIP symmetry rule to apply to all VoIP traffic, including over-the-top VoIP traffic.[44] Verizon suggests that end office switching services can never occur when "a call is converted to IP format and placed on the public Internet."[45] But the Commission previously determined that calls routed through the public Internet are a form of Interconnected VoIP service.[46] LECs such as Peerless and its VoIP partners provide all of the functions associated with end office switching.[47] Peerless and its VoIP partners provide the last point of switching to transmit a call from an IXC to an IP-enabled platform. That switching function is what Peerless recovers from IXC customers like Verizon through its tariffed end office terminating switched access charges, not the work performed by third-party broadband providers. Broadband providers generally do not even know that a customer has chosen an over-the-top VoIP service to make and receive calls. Thus, if VoIP-LECs are prohibited from charging IXCs for end office terminating switched access services for traffic delivered to IP-enabled platforms, then IXCs would pay no one for these calls. This

01-92, at 3-17 (July 3, 2018) ("01/Peerless Reply Comments"); *see also* Petition of CenturyLink for a Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92 (May 11, 2018). Peerless incorporates its comments on the CenturyLink Petition for Declaratory Ruling by reference herein. Unsurprisingly, the only two commenters that oppose CenturyLink's Petition are Verizon and AT&T, large IXCs that often refuse to pay valid LEC end office switched access charges. *See* Comments of Verizon on Petition of CenturyLink for a Declaratory Ruling, WC Docket No. 10-90, CC Docket No. 01-92, at 2-8 (June 18, 2018); AT&T Comments at 13-15.

[43] 47 C.F.R. § 51.913(b).

[44] *See* 01/Peerless Comments at 3-6 (citing *Transformation Order* at ¶¶ 941, 954, n.1942).

[45] Petition at 7.

[46] *See* 01/Peerless Comments at 5 (citing *Extension of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Servs. Providers & Broadband Internet Access Providers*, Report and Order, 27 FCC Rcd 2650 (2012)).

[47] *See* 01/Peerless Comments at 6-10; 01/Peerless Reply Comments at 3-13.

would result in an unjustified windfall for IXCs, allowing them to charge customers for calls delivered over VoIP without paying for the termination of such calls.[48] The Commission should avoid this inequitable result by confirming that VoIP-LECs perform the functional equivalent of end office switched access services when they terminate calls to IP-enabled platforms.

C. The Commission Did Not Prohibit LECs from Collecting Tariffed End Office Terminating Switched Access Charges for Calls Delivered to IP-Enabled Platforms

Instead of addressing the Commission's access charge approach for IP-enabled services directly, Verizon instead focuses on precedent concerning legacy calling card and conference calling platforms that do not involve ESPs.[49] For example, Verizon cites to the *AT&T Calling Card Order* to suggest that the Commission applies an end-to-end analysis to all "enhanced" prepaid calling card services.[50] This ignores the Commission's actual findings. First, the Commission explicitly limited its decision to the particular calling card service offered by AT&T and did not make any decisions of general applicability about the treatment of all calling platforms.[51] Second, far from involving an "enhanced" service, the Commission found that AT&T's calling card offering was just another form of long distance telecommunications service and specifically rejected AT&T's claim that it provided an enhanced service "analogous to ISP-

[48] The IXCs cannot deny that an end office switching function was performed for traffic delivered to an IP-enabled platform because the calls were completed − there is no reason why IXCs do not have to pay someone for this service. *See* 01/Peerless Reply Comments at 13.

[49] Petition at 3-8.

[50] *Id.* at 4, 7 (citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005) ("*AT&T Calling Card Order*")).

[51] *See AT&T Calling Card Order* at ¶ 1 ("We limit our decision in this Order to the calling card service described in AT&T's original petition.").

bound traffic."[52] Consequently, in contrast to an IP-enabled platform, the AT&T calling card offering provided nothing other than basic telephone service.[53] Finally, Peerless notes that the *AT&T Calling Card Order* involved a service offered by the IXC itself, not a VoIP provider working with a LEC that did not operate the platform.[54]

Most perplexing, Verizon indicates that the Commission's decision in *Qwest Communications* showed that calls made to a two-stage platform "terminated with the ultimate called party, not at the platform."[55] Verizon misreads the Commission's decision. The language Verizon quotes to support the instant Petition actually refers to Qwest's arguments to the Commission in support of its position that traffic did not terminate to conference calling platforms because such platforms were not end users.[56] But the Commission rejected Qwest's argument in that case. In *Qwest Communications*, the Commission determined that the platforms actually did constitute end users under the applicable tariff and that Qwest was properly charged for terminating access services.[57] In fact, the Commission concluded that Qwest had "failed to prove that the conference calling company-bound calls do not terminate" at the platform.[58]

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[52] *Id.* at ¶¶ 25-26.

[53] *Id.* at ¶ 15.

[54] *Id.* at ¶ 6.

[55] *See* Petition at 4 (citing *Qwest Commc'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Qwest Communications*")) (emphasis removed).

[56] *Quest Communications* at ¶¶ 34-35.

[57] *Id.* at ¶ 35.

[58] *Id.* at ¶ 39. Verizon fails to note that the Commission subsequently reconsidered the *Qwest Communications* decision on other grounds. *See Qwest Commc'ns Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801, ¶¶ 25-26 (2009) (finding that the LEC backdated contract amendments and invoices in support of its claims) ("*Qwest Reconsideration Order*"). Therefore, the *Qwest Communications* decision relied upon by Verizon in its Petition is neither relevant nor good law.

Verizon's Petition lacks credibility in misrepresenting to the Commission the Commission's own orders. Verizon should not be allowed to selectively quote from prior decisions to put words into the Commission's mouth that actually conflict with Commission determinations.

Verizon places particular emphasis in its Petition on the *Broadvox* decision to support its argument that calls to an IP-enabled two-stage dialing platform do not terminate at the platform.[59] However, as the court recently explained when granting Peerless's collection claims against Verizon, the *Broadvox* court "oversimplf[ied]" existing precedent and "fail[ed] to recognize the important distinctions between services provided by traditional telecommunications providers and internet service providers."[60] As with Verizon's Petition, the *Broadvox* court did not discuss the Commission's ESP exemption or the end user status of IP-enabled platforms for the purpose of determining access charges. The *Broadvox* court also recognized that existing precedent like *Bell Atlantic* "does not stand for the proposition that the end-to-end analysis generally applies *outside the jurisdictional context*."[61] Nevertheless, the *Broadvox* court referenced prior decisions involving non-IP-enabled services to conclude that the Commission's longstanding distinction between its jurisdictional analysis and its reciprocal compensation analysis had no legal significance.[62] But as explained above, this conclusion must be incorrect because the Commission treats calls destined to IP-enabled platforms as calls to end users. It simply cannot be true that an IP-enabled platform is both an intermediate stop for a "two-phased call," as Verizon alleges, and simultaneously an end user for terminated switched

[59] Petition at 8-9 (citing *Broadvox-CLEC, LLC v. AT&T Corp.*, 184 F. Supp. 3d 192 (D. Md. 2016) ("*Broadvox*")).

[60] *Peerless/MCI Order*, 2018 U.S. Dist. Lexis 43044 at * 39.

[61] *Broadvox*, 184 F. Supp. 3d at 212 (citing *Bell Atlantic*, 206 F.3d at 3-4) (emphasis added).

[62] *Id.* at 209-14.

access traffic.[63] Thus, the Commission should clarify that traffic delivered to an IP-enabled dialing platform terminates at the platform to avoid further attempts by IXCs and others to avoid their tariff payment obligations.

The *Broadvox* decision also comes with an important caveat that distinguishes the case from Peerless's delivery of traffic to IP-enabled platforms under its tariffs. The tariff at issue in *Broadvox* did not define when a call "terminated," requiring the court to look to outside sources to determine when the traffic at issue was delivered to an end user.[64] By contrast, the delivery of calls to entities operating IP-enabled platforms represents end office terminating switched access service under Peerless's tariffs. Peerless's tariffs define the "terminating carrier" as "[t]he carrier who terminates a call to the carrier's end user on the carrier's network or switching equipment."[65] The tariffs further state that end users under the tariff include "a resident, business *or enhanced service providers* (including but not restricted to, internet service providers, conference calling providers, and Voice over Internet Protocol service providers) or other entities."[66] Here, Peerless is the terminating carrier when it delivers traffic to end user IP-enabled platforms. In addition, Peerless's tariffs define the "termination point" of a call as "[t]he point of demarcation within a customer designated premises or point of interconnection at which the Company's responsibility for the provision of service ends."[67] Peerless's responsibility for the provision of a call destined to an IP-enabled two-stage dialing platform under its tariffs ends

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[63] Petition at 8.

[64] *Broadvox*, 184 F. Supp. 3d at 213-17. *See* Petition at 8 (noting that the court considered the "ordinary commercial meaning of termination" when rendering its decision) (internal quotations omitted).

[65] *See, e.g.*, Peerless FCC Tariff No. 4, at 9 (issued Sep. 13, 2013).

[66] *Id.* at 6 (emphasis added).

[67] *Id.* at 9.

when it delivers the traffic to the platform. Thus, unlike the tariff at issue in *Broadvox*, Peerless specifically contemplated the delivery of traffic to IP-enabled two-stage dialing platforms in its tariffs and included it as part of its switched access services subject to charge.

Verizon does not claim that its end-to-end analysis supplants clear tariff language to the contrary and the Commission previously determined that it will not expand or contract provisions regarding switched access services beyond a tariff's scope.[68] Consequently, even if Verizon is right as a matter of general principle (which it is not) that calls to an IP-enabled platform do not terminate at the platform, the Petition provides no basis for overriding tariff provisions specifying that such calls terminate at the platform and remain subject to switched access charges. The Commission therefore should deny Verizon's request to prohibit LECs from collecting tariffed end office terminating switched access charges for traffic delivered to IP-enabled platforms.

In the alternative, to the extent that the Commission decides that traffic delivered to IP-enabled platforms does not terminate at the platform and therefore LECs cannot collect end office terminating switched access charges despite contrary tariff language, such a ruling should only apply prospectively. As explained in Peerless's comments on the CenturyLink Petition for Declaratory Ruling, significant changes in law should not apply retroactively when retroactive

[68] *See Qwest Reconsideration Order* at ¶ 24 ("The fact remains, however, that the relevant tariff defines switched access service as providing a communications path to an end user. Whether or not this definition is narrower than that used for purposes of the Act and Commission rules, it is nonetheless the definition . . . for purposes of determining whether [the] charges are in compliance with [the] tariff.") (emphasis removed). A valid tariff is considered to be the law "and to therefore conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer." *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). As tariffs are public documents, a carrier's customers are charged with knowledge of the tariffs' terms and conditions. *MCI Telecomms. Corp. v. Dominican Commc'ns Corp.*, 984 F. Supp. 185, 189 (S.D.N.Y. 1997).

application would be inequitable and unjust.[69] Prospective application of significant changes in law is necessary in order to "to protect the settled expectations of those who had relied on the preexisting rule,"[70] particularly when the changes "alter[] an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry."[71] The Commission must consider the equities when deciding whether a particular decision should be applied retroactively and the Commission has expressly declined to apply new access charge rules retroactively in other circumstances.[72] As explained above, the Commission has recognized that IP-enabled platforms represent end users for the purposes of determining switched access charges. Overturning 35 years of settled precedent now in response to the Petition would be a significant departure from established law and should only apply on a going-forward basis. Retroactive application would result in manifest injustice, as LECs would be punished for charging for end office terminating switched access services consistent with existing law.[73] The telecommunications industry would face significant disruption if charges paid years ago in compliance with existing law were now subject to retroactive refund liability. Large IXCs like Verizon and AT&T would seize upon the opportunity to expose competitors to costly, company-threatening litigation. To avoid such manifest injustice and disruption to the

[69] *See* 01/Peerless Comments at 12-14 (citing *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992)).

[70] *Verizon*, 269 F.3d at 1109 (internal quotations omitted). *See AT&T*, 978 F.2d at 732 (noting that a party's conduct should be judged by the law that existed at the time of the conduct).

[71] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[72] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (finding that "the ill effects of retroactivity must be balanced against the mischief of producing a result which is contrary to . . . legal and equitable principles") (internal quotations omitted); *Petition for Declaratory Ruling that AT&T Phone-to-Phone IP Telephony Servs. are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, ¶ 23 (2004) (stating retroactive liability is decided on a "case-by-case" basis).

[73] 01/Peerless Comments at 14-17.

telecommunications industry, the Commission should apply any ruling prohibiting LECs from collecting tariffed end office terminating switched access charges for calls delivered to IP-enabled platforms prospectively from the effective date of the declaratory ruling. Applying its ruling prospectively would render Verizon's arguments against Peerless moot because, as explained above, the transition of price cap carriers to bill-and-keep for end office terminating access service is now complete.

III. CONCLUSION

Accordingly, the Commission should deny Verizon's Petition and confirm that LECs are entitled to collect tariffed end office terminating switched access charges for calls delivered to IP-enabled platforms.

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